BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ISRAEL VALDES	)	
Claimant	)	
	)	
VS.	)	
	)	
MID-AMERICA EXTERIORS, INC.	)	
Respondent	)	Docket No. 1,057,117
	)	
AND	)	
	)	
KANSAS BUILDING INDUSTRY	)	
WORKERS COMPENSATION FUND	)	
Insurance Fund	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the October 18, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Michael L. Snider of Wichita, Kansas, appeared for claimant. Roy T. Artman of Topeka, Kansas, appeared for respondent and its insurance fund (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 13, 2011, preliminary hearing and exhibit thereto; the transcript of the October 6, 2011, deposition of Troy Parks; the transcript of the October 6, 2011, deposition of Gregory L. Schmidt; and all pleadings contained in the administrative file.

ISSUES

At preliminary hearing, claimant requested temporary total disability (TTD) benefits and the medical bills that were incurred for his injuries be paid by respondent including reimbursement of medical mileage and prescriptions. In Claimant's Application for Review, claimant raises two issues: (1) Whether the ALJ erred in finding that claimant did not have a work-related injury arising out of and in the course of his employment with respondent and (2) Whether the claim is "compensable". The underlying factual dispute is whether

claimant was an employee of the respondent or was an employee of or subcontractor for an individual by the name of Troy Parks.

Troy Parks is the installation manager of respondent. The roof on his home in Goddard, Kansas, was damaged during a hailstorm. In order to save money, Mr. Parks decided to undertake the roof repairs himself. He took vacation from his job with respondent to make the roof repairs. Mr. Parks determined that he needed assistance in making the roof repairs. Caleb Schmidt, the son of one of the owners of respondent, recommended a subcontractor by the name of Guillermo Arevalos. Mr. Arevalos arranged for claimant and an individual by the name of Lorenzo to assist Mr. Parks in making the roof repairs. While assisting Mr. Parks in making roof repairs, claimant fell off a ladder, injuring his thoracic spine and left wrist.

Claimant asserts he was an employee of respondent and that his thoracic spine and left wrist injuries arose out of and in the course of his employment with respondent. Respondent contends claimant was an employee of Troy Parks. The ALJ determined claimant was not employed by respondent and denied his request for benefits from respondent.

Did claimant's thoracic spine and left wrist injuries arise out of and in the course of employment with respondent? Specifically, did an employer-employee relationship exist between claimant and respondent on the date claimant fell off the ladder at the home of Troy Parks or was claimant working for a subcontractor of respondent such that he could elect to proceed against the principal?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

On July 21, 2011, claimant was on a ladder, ready to step onto the roof of Troy Parks' home in Goddard, Kansas, when the ladder slipped. Claimant fell several feet from the ladder and landed on the ground next to the ladder. He felt immediate pain in his back and left wrist. As indicated above, Mr. Parks is respondent's installation manager. Mr. Parks placed claimant on a piece of plywood and loaded him into a minivan and transported claimant to Via Christi Regional Medical Center. At Via Christi, claimant was diagnosed with a left wrist distal radial fracture and a fracture of the T12 thoracic vertebra. Claimant's left wrist was placed in a cast, he was prescribed pain medication and he was given a TLSO brace to use for his back. Claimant was to follow up with an orthopedic specialist in 10-14 days. He was discharged from Via Christi after 3½ days.

Claimant is a native of Mexico and is neither a citizen nor a legal resident of the United States, but does speak and understand English. He does not have a work visa to work in the United States. He worked with Guillermo Arevalos, a subcontractor, putting in

driveways. Mr. Arevalos sent claimant and Lorenzo to work at the home of Troy Parks. Claimant began working for Mr. Parks on July 18, 2011. Claimant testified that in addition to Lorenzo, several other individuals were working on the roof. Those individuals wore T-shirts bearing respondent's logo. Claimant alleges he was told by Mr. Parks that Mr. Parks was an owner of respondent. Claimant acknowledges that after the accident, he was paid $400.00 in cash by Mr. Parks. This was for four days of work at $100.00 per day. The following testimony by claimant is noteworthy:

> Q. (Mr. Snider) Okay. And did he [Troy Parks] agree to employ you at this residence?
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> A. (Claimant) Yes.
>
> Q. Okay. And who directed the work that you did at this residence?
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> A. Troy did.[1]

As respondent's installation manager, Troy Parks' duties are to order materials, schedule jobs and expedite jobs. Respondent primarily contracts to install siding and windows on houses. Gregory L. Schmidt, co-owner of respondent, testified that siding and window installation comprised 98% of all respondent's work. He indicated that on rare occasions respondent does roofing work. Mr. Schmidt concurred with Mr. Parks that respondent would work on approximately six roofs a year. This was usually a by-product of other work respondent had contracted. Respondent sells siding and windows and contracts with subcontractors to perform the actual work of installing siding, windows and roofs. Mr. Schmidt testified that respondent often refers customers who need roof repairs to Highland Roofing. He also indicated that David Becker, the other co-owner of respondent, hired all subcontractors used by respondent. Mr. Schmidt testified that he first heard of claimant from Mr. Becker. Mr. Becker told Mr. Schmidt that an attorney called regarding claimant filing a workers compensation claim.

At the preliminary hearing, David Becker corroborated the testimony of Mr. Schmidt. He testified that he generally hires employees and subcontractors and that Mr. Parks was not involved in that process. He denied that respondent ever bid on repairing Mr. Parks' roof or that respondent provided services for repairing Mr. Parks' roof. Mr. Becker testified that respondent provided no materials or tools to repair the roof of Mr. Parks. He indicated that respondent had no involvement in the repair of Mr. Parks' roof. Mr. Becker testified that the personal residence of Mr. Parks had suffered hail damage. Mr. Parks asked Mr. Becker to take a week's vacation to repair the roof. Mr. Becker was unaware that Mr. Arevalos came to the offices of respondent and spoke to Mr. Parks about providing workers to assist Mr. Parks in making roof repairs to his residence. He also testified that Mr. Arevalos never did any roof repair for respondent.

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[1] P.H. Trans. at 9.

Mr. Parks' testimony concerning the business operation of respondent was similar to that of the co-owners of respondent. He indicated that respondent was not a roofing company and worked on six roofs a year. Mr. Parks testified that he never scheduled Mr. Arevalos to perform a job for respondent.[2] Mr. Parks confirmed that he took a week of vacation from his job with respondent to repair the hail-damaged roof and to do some additional remodeling to his home. Mr. Parks told a friend, Caleb Schmidt, who is also the son of respondent's co-owner Gregory L. Schmidt, of a need to hire some workers by the day to work on his roof. Guillermo Arevalos had been previously hired by Caleb Schmidt to do concrete work and repair a roof at his home, and Caleb recommended Mr. Arevalos to Mr. Parks. Caleb Schmidt gave Mr. Parks a card with the name and telephone number of a person by the name of Adrian. Mr. Parks was to call Adrian, who in turn was to contact Mr. Arevalos and have him contact Mr. Parks.

Troy Parks called Adrian, and Mr. Arevalos came to respondent's place of business and spoke to Mr. Parks. At that meeting Mr. Parks requested Mr. Arevalos provide two workers to help with the roof repairs. Mr. Parks assumed that Mr. Arevalos had workers compensation insurance. Mr. Parks did not know if respondent ever used Mr. Arevalos as a subcontractor, but indicated that he had never scheduled Mr. Arevalos to do a job for respondent.

On Monday, July 18, 2011, claimant came to the home of Mr. Parks. Mr. Parks indicated that claimant spoke English. An agreement was reached that claimant would work as a subcontractor for $100.00 per day. Mr. Parks indicated that in addition to claimant and Lorenzo, he hired other subcontractors to work on the roof and do remodeling. Claimant worked only on the roof. Mr. Parks paid some subcontractors by the day and others by the hour. Mr. Parks testified that he provided claimant a potato fork to remove shingles and the ladder. All materials for the roof were provided by Mr. Parks and were purchased at Star Lumber and ABC Wholesale. None of the materials came from respondent. No equipment was provided by respondent, and all subcontractors either provided their own equipment or used equipment belonging to Mr. Parks.

Mr. Parks testified that he never contacted anyone at respondent for a bid to repair his hail-damaged roof or used respondent's assistance to facilitate the roof repair. He provided the shirts with respondent's logo to some of the subcontractors working on his house. Mr. Parks testified that he never mentioned that he had workers compensation insurance to claimant.

The ALJ concluded that claimant was injured while working for Troy Parks, not respondent. The ALJ denied claimant's request for benefits from respondent.

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[2] Parks Depo. at 25.

PRINCIPLES OF LAW

The 2011 legislative session resulted in amendments to the Workers Compensation Act. L. 2011, Ch. 55, Sec. 5 provides in relevant parts:

> (f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . . .
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> (h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 44-503 provides in relevant parts:

> (a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.
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> . . . .
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> (d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under the principal's control or management, or on, in or about the execution of such work under the principal's control or management.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[3] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[4]

ANALYSIS

This Board Member affirms the ALJ's finding that claimant was not injured while working for respondent. Claimant fell off the ladder while working for Troy Parks, individually. Mr. Parks took a week of vacation, as installation manager of respondent, to repair his hail-damaged roof and to do some remodeling of his personal residence. It was Troy Parks, not respondent, who hired claimant through Mr. Arevalos. Mr. Parks provided all of the materials for the job. He provided all tools and equipment for the project, or the workers he employed provided their own tools and equipment. Mr. Parks paid claimant and the other workers he hired, not respondent.

Respondent rarely engaged in roofing. Mr. Parks did not know if respondent utilized Mr. Arevalos as a contractor. Mr. Parks never scheduled Mr. Arevalos to work for respondent. Neither Mr. Schmidt nor Mr. Becker, the co-owners of respondent, were asked if respondent ever hired Mr. Arevalos as a subcontractor. Mr. Becker testified that respondent did not bid to repair the roof or remodel Mr. Parks' home. As Mr. Becker testified, respondent had no involvement in the project at Mr. Parks' home. Simply put, claimant failed to meet his burden of proof that he was employed by respondent on the date he fell off the ladder at the home of Troy Parks. Nor did claimant meet his burden of proof that Mr. Arevalos was a subcontractor of respondent.

CONCLUSION

There was not an employer-employee relationship between respondent and claimant on the date claimant was injured. No evidence was presented to indicate Mr. Arevalos was a subcontractor of respondent or that claimant was working as an employee of a subcontractor of respondent when he was injured. Therefore, claimant's thoracic spine and left wrist injuries neither arose out of nor occurred in the course of employment with respondent.

WHEREFORE, the undersigned Board Member affirms the October 18, 2011, preliminary hearing Order entered by ALJ Clark.

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[3] K.S.A. 44-534a.

[4] K.S.A. 2010 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this ____ day of December, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Fund
John D. Clark, Administrative Law Judge